No. 87-73

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

Katherine B. NICHOLS, etc.,

Petitioners,

v.

Don RYSAVY, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF AMICI CURIAE OF THE ARAPAHOE TRIBE OF THE WIND RIVER RESERVATION; BLACKFEET TRIBE OF THE BLACKFEET INDIAN RESERVATION; (additional amici on inside cover) IN SUPPORT OF PETITIONERS

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August 1987

ADDITIONAL AMICI

Coeur D'Alene Tribe of the Coeur D'Alene Reservation
Confederated Salish and Kootenai Tribes of the Flathead Reservation
Confederated Tribes of the Colville Reservation
Covelo Indian Community of the Round Valley Reservation
Crow Tribe of Montana
Kalispel Indian Community of the Kalispel Reservation
Klamath Tribe of Indians
Mescalero Apache Tribe of the Mescalero Reservation
Oglala Sioux Tribe of the Pine Ridge Reservation
Omaha Tribe of Nebraska
Rosebud Sioux Tribe
Santee Sioux Tribe of Nebraska
Seneca Nation of New York
Sisseton-Wahpeton Sioux Tribe
Spokane Tribe of the Spokane Reservation
Standing Rock Sioux Tribe of the Standing Rock Reservation
Three Affiliated Tribes of the Fort Berthold Reservation
Turtle Mountain Band of Chippewa Indians, Turtle Mountain Indian Reservation
Winnebago Tribe of the Winnebago Reservation of Nebraska

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INTEREST OF AMICI CURIAE

Written consent to the filing of this brief was obtained from the petitioners' attorney and from the respondents' attorneys including the United States and

the State of South Dakota. None objected to the filing of this amici curiae brief. Copies of the consents that were received have been filed with the Clerk of this Court.

In 1887, Congress passed the General Allotment Act (Dawes Act), 24 Stat. 388 authorizing the issuance of allotments to individual Indians. That set in motion one of the most devastating policies ever inflicted on Native Americans. On dozens of reservations, including the reservations of most of the amici tribes, millions of acres of communal tribal land were allotted to individual Indians. "Surplus" lands were then made available for sale to non-Indians.[1/]

1/ When the Act was passed, Indian land holdings amounted to approximately 138

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Allotments were issued pursuant to the policy expressed in the General Allotment Act of 1887, 24 Stat. 388, on most of the reservations of the amici Indian tribes. Often, specific allotment statutes were enacted to implement the policy on the various reservations. See e.g., Sioux Allotment Act, 25 Stat. 888; Appropriations Act of June 30, 1919, 41 Stat. 3, 16 (allotment of Blackfeet Reservation). The allotments were to be held in trust for twenty-five years and for such additional time as the President should provide. The

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1/ -Continued-

million acres. By 1934, that area was reduced to approximately 48 million acres. Of the nearly 90 million acres lost, approximately sixty million acres were sold or ceded as surplus. The other thirty million acres lost represented land passing from the transfer of individual allotments. F. Cohen, Handbook of Federal Law, (2d ed. 1982) at 138. Of that amount approximately 1.5 million acres was land affected by the forced fee patent policy at issue in these cases. Petition for Certiorari p. 10.

trust period of many of these allotments was cut short by the Secretary of the Interior through the issuance of fee patents. These fee patents were purportedly issued pursuant to the Burke Act, 34 Stat. 182, which authorized the Secretary of the Interior to issue a fee patent to an allottee "competent and capable of managing his or her affairs." But many fee patents were issued without applications therefor and without making individual determinations of an allottee's competency to manage his or her affairs. Many of the allottees were not competent to manage their affairs and lost their lands as a result.

The loss of allotted lands has had a profound impact on many of the amici tribes, causing their reservations to be checkerboarded with "non-trust" land and

depriving their members of crucial resources and the means of maintaining their livelihoods. The Tribes have a vital interest in seeing the allotments returned to their rightful Indian owners.[2/]

In addition, all of the amici have continuing relationships with the United States and are concerned about the holding of the court below that the United States is an indispensable party to actions to recover trust land from third parties where the federal government was involved in some way in the loss of the land. While the

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2/ Amici have approximately 6,500 forced fees listed on their reservations. The Blackfeet Tribe has over 800 claims, the Confederated Salish and Kootenai Tribes has nearly 800 claims on its reservation, the Crow Tribe, the Oglala Sioux Tribe and the Rosebud Sioux Tribe all have over 600 claims and other amici likewise have such claims numbering in the hundreds. See 48 Fed. Reg. 13697-13920 (Mar. 31, 1983); 48 Fed. Reg. 51204-51268 (Nov. 7, 1983).

holding below involves only allottees, it has the potential of severely undermining the ability of amici to protect their assets, and certainly it directly impacts the ability of the members of amici Tribes to protect their property.

REASONS FOR GRANTING THE WRIT

I. THE CASE PRESENTS ISSUES OF GREAT IMPORTANCE TO MANY INDIAN TRIBES AND INDIVIDUALS

At stake in this case is the ability of tribes and individual Indians to protect their property rights where the federal government has refused or neglected to do so. More specifically, literally thousands of forced fee patent claims involving over 1.5 millions of acres are at stake in the case.

In 1966, Congress passed 28 U.S.C. §2415 to provide a six-year statute of limitations on certain actions brought by

the United States. As 1972 approached, the government became concerned that significant claims which the United States could bring on behalf of Indians would be lost. An extension of the limitations period was sought and received and a program was begun to identify claims which the United States could bring on behalf of Indians. Thousands of claims were identified and additional extensions were sought so that the identification process could be completed. The last extension, the Indian Claims Limitation Act of 1982, 96 Stat. 1976, provides for the listing of all identified claims in the Federal Register. Forced fee claims represent one of the largest categories of claims.

More than seventy tribes have members who have forced fee patent claims on the lists published in the Federal Register. Several others have claims listed which are

characterized by terms such as "questionable cancellation of patent" and probably represent forced fee claims. Over 9,400 of the claims listed in the Federal Register are forced fee claims. More than 1,100 claims are listed under different headings but appear to be forced fee patents. See lists at 48 Fed.Reg. 13697-13920 (March 31, 1983) and 48 Fed.Reg. 51204-51268 (Nov. 7, 1983).

Forced fee claims are listed from the Seventh, Eighth, Ninth, and Tenth Circuits and from at least thirteen states in the west and midwest. Approximately 1.5 million acres of land were lost by Indians because of the forced fee policy. This land is now viewed as non-trust land by the BIA. The non-trust status of the land complicates tribal governmental control over the land. The loss of land by

individual tribal members puts additional strain on limited tribal resources.

The forced fee policy had a devastating effect on thousands of Indian allottees and their tribes. The effects continue to be felt to this day. But the impact of the decision below extends far beyond forced fee cases. It arguably extends to every claim in which there is federal wrongdoing. That may include virtually all of the thousands of claims of whatever type listed in the Federal Register. See description of claims in Covelo Indian Community v. Watt, 551 F.Supp. 366, 370-73 (D.D.C. 1982).[3/] The Eighth Circuit

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3/ These claims are of several types. Secretarial transfer claims of the type involved in United States v. Mottaz, 476 U.S. ____, 106 S.Ct. 2224 (1986) clearly

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Court of Appeals' holding that the United States is an indispensable party to actions to recover property lost to third parties through federal action prevents Indians and possibly tribes (see f.n. 4, infra) from

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3/ -Continued-

involve federal complicity. In secretarial transfer cases, sales of inherited allotments on reservations were approved by BIA officials without the consents of all beneficial heirs as allegedly required by 25 U.S.C. §483. Thousands of unapproved rights of way claims are listed, at least some of which were accomplished with the assistance of the BIA. Covelo, 551 F.Supp. at 373. Over 1,600 age old assistance claims are listed. States and local subdivisions were paid by the BIA from the trust accounts of deceased Indians because of state old age assistance rendered to those deceased Indians. This is one of the categories of claims Congress has agreed to resolve. See 25 U.S.C. §2301 et seq. Another class of claims involving federal complicity which Congress has addressed by legislation is the loss of trust land on the White Earth Reservation in Minnesota. See White Earth Reservation Land Settlement Act of 1985, 100 Stat. 61. One would be hard-pressed to identify a category of claims in which the federal government is not implicated.

protecting their property. The Indians are left totally at the mercy of the United States to represent them in cases where there is federal wrongdoing. But the United States refuses to represent them. See Covelo Indian Community v. Watt, 551 F.Supp. 366 (D.D.C. 1982). It is ironic that the Indians would be barred from protecting their own property interests in the very circumstances where that protection is most vital, i.e., where the injury is the result of federal policies and federal actions.

II. THE DECISION BELOW IS ERRONEOUS

A. It Conflicts In Principle With Decisions Of This Court And With The Indian Claims Limitation Act

The law is unanimous that where Indian or tribal interests are not adverse to those of the United States, the United States is not an indispensable party to an action by an Indian or Tribe against a

third party to recover trust land. See cases collected in Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), cert. denied, 465 U.S. 1049, reh'g denied, 466 U.S. 954. However, the Eighth Circuit opinion below and a Tenth Circuit opinion rendered on the same day, Navajo Tribe of Indians v. State of New Mexico, 809 F.2d 1455 (10th Cir. 1987) have held that where a tribe or allottee has a claim against a third party in which the federal government is implicated, the United States is an indispensable party if its interests are not aligned with those of the Indians. Thus, rather than allow a tribe or allottee to protect its property against a non-Indian where the United States is at odds with the Indian, the Indians are simply left without a remedy.

This result is inconsistent with this Court's decision in Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968), in which this Court held that allottees had standing to sue for breach of an oil and gas lease. The ". . . dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment." 390 U.S. at 369. See also Hodel v. Irving, ____ U.S. ____, 107 S.Ct. 2076 (1987) (heirs to interests in allotments made under the Sioux Allotment Act had standing to bring descendants' claims where the Secretary of the Interior was unlikely to bring them since they turned on a claim that a federal statute is unconstitutional.)

Congress intended, with the passage of the Indian Claims Limitation Act, "to give

the Indians one last opportunity to file suits covered by [28 U.S.C.] §2415(a) and (b) on their own behalf." County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 244 (1985). It is especially unjust that the decision below prevents the Indians from taking advantage of the Indian Claims Limitation Act. The Eighth Circuit's decision means that the claims are preserved only if the federal government chooses to bring them.[4/]

4/ The decision below does not involve and does not address whether Indian tribes rather than individual alltotees, may bring similar claims under 28 U.S.C. §1362 (original jurisdiction in civil actions brought by Indian tribes), without the presence of the United States. Cf. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) (§1362 was intended by Congress to permit tribes to sue under the same rules that would apply if the United States had sued on their behalf). But see Navajo Tribe of Indians v. State of New Mexico, 809 F.2d 1455 (10th Cir. 1987).

B. 25 U.S.C. §345 Does Not Require Joinder of the United States

These actions were brought under 25 U.S.C. §345 which provides jurisdiction over actions to recover allotments. United States v. Mottaz, 476 U.S. ____, 106 S.Ct. 2224 (1986). The Court said:

> To hold that in all cases brought under §345 the United States must be named as a party defendant would restrict access to federal courts afforded Indians raising claims or defenses involving their land entitlements because the United States would obviously not be a proper party in many private disputes that related to land claims originally granted by various allotment acts.

106 S.Ct. at 2231. Thus, there is no requirement to join the United States in such actions and it was error for the lower court to require such joinder. This Court should grant certiorari to review the decision of the Eighth Circuit and establish a uniform national rule on the crucial issue of indispensability.

III. THE ACTION OF THE SECRETARY OF THE INTERIOR IN FORCING FEE PATENTS ON ALLOTTEES WITHOUT DETERMINING THE COMPETENCY OF EACH ALLOTTEE WAS VOID AND THEREFORE NO STATUTE OF LIMITATIONS APPLIES

The Burke Act expressly conditioned the authority of the Secretary of the Interior on making a determination of each allottee's competency. Cf. United States v. Debell, 227 F. 760 (8th Cir. 1915). In issuing fee patents based on blood quantum, (a policy initiated after the Debell case) the Secretary acted outside the scope of his authority and his actions were void ab initio. The land is thus still in trust. The Court of Appeals erred in holding that the fee patents were merely voidable and not void.

The Indian Clams Limitations Act, 96 Stat. 1976, makes clear the time has not run on an action to recover the land from third parties. And if the fee patents were void, 28 U.S.C. §2401 would not apply even

if it is assumed arguendo that the United States is an indispensable party. Mottaz v. United States, 753 F.2d 71 (8th Cir. 1985), rev'd on other grounds, 106 S.Ct. 2224 (1986).

CONCLUSION

The Court should grant certiorari to correct the erroneous decision of the Court of Appeals that the United States is an indispensable party in actions to recover trust lands and to correct the erroneous interpretation of the Burke Act by the Court of Appeals.

Respectfully submitted,

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August 1987